FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 8 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937
No. 706.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MACKAY RADIO & TELEGRAPH COMPANY,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI.

H. W. O'MELVENY,
WALTER K. TULLER,
900 Title Insurance Bldg., Los Angeles,
Attorneys for Respondent.

O'MELVENY, TULLER & MYERS,
LOUIS W. MYERS,
HOWARD L. KERN,
HOMER I. MITCHELL,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles

SUBJECT INDEX.

PAGE

Statement 3

Respondent's contentions 4

I.

This court has no jurisdiction to grant a writ of certiorari as requested in the petition herein 5

A. The Circuit Court of Appeals was without jurisdiction under the National Labor Relations Act to grant a rehearing, therefore, the judgment of January 11, 1937, was the final judgment of the court below, and this petition for certiorari was filed too late 6

B. The court below was without jurisdiction under its own rules to grant a rehearing in this proceeding 10

II.

The decision of the court below is not in conflict with any other decision either of this court or of any Circuit Court of Appeals 12

A. Since each judge rendered a separate opinion, the decision of the court established only the rights of the parties without creating any precedent 12

B. The decisions in the Jeffery, Bell and Carlisle cases are not contrary to the judgment of the court below that enforcement of the order be denied or to the opinions of the judges rendering it 13

C. The judgment of the court below is not erroneous in the light of the Jones & Laughlin case 18

PAGE

III.

The judgment of the court below was not erroneous in the light of the statute 19

A. The National Labor Relations Board had no jurisdiction under the act to enter its order 19

B. The Board's order was improvidently made and enforcement was properly denied because the amended complaint failed to allege a jurisdictional requirement, to-wit, that the men named in the complaint were employees as defined in the act 23

C. The evidence does not support the Board's order because it fails to show that the men named in the amended complaint were employees as defined in the act 24

D. The decision of the court below was not erroneous in denying enforcement of the Board's order in toto 26

IV.

The record is inadequate to present to this court any question of general importance 27

V.

Conclusion 28

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Arkansas Wholesale Grocers Assn. v. Federal Trade Comm., 18 F. (2d) 866	25
Baltimore and Ohio Railroad Company v. United States, 293 U. S. 454	22
Camp v. Gress, 250 U. S. 308	8
Chamber of Commerce v. Federal Trade Comm., 280 F. 47	8
Dollar Sav. Bank v. United States, 19 Wall. 227	8
Donnelly Garment Co. v. International Ladies Garment Workers Union (D. C., Mo., Dec. 31, 193)	22
Durant v. The Essex Co., 7 Wall. 107	13
Etting v. The Bank of the United States, 11 Wheat. 59	13
Federal Trade Comm. v. A. McLean & Son, 84 F. (2d) 910	25
Federal Trade Comm. v. Balme, 23 F. (2d) 618	7
Federal Trade Comm. v. Curtis Co., 260 U. S. 568	25
Federal Trade Comm. v. Gratz, 253 U. S. 421	24
Heald v. Dist. of Columbia, 254 U. S. 20	8
Hertz v. Woodman, 218 U. S. 205	13
Hills Bros. v. Federal Trade Comm., 9 F. (2d) 481	25
International Shoe Co. v. Federal Trade Comm., 280 U. S. 291	25
Jeffery-De Witt Insulator Co. v. National Labor Relations Board, 91 F. (2d) 134	13, 14, 15
Jones & Laughlin case, 301 U. S. 1, 47	18
KVOS v. Associated Press, 299 U. S. 269	15, 17
Luco v. De Toro, 88 Cal. 26	13
Morse v. United States, 270 U. S. 151	10
National Labor Relations Board v. Bell Oil & Gas Co., 91 F. (2d) 509	13, 15, 16
National Labor Relations Board v. Carlisle Lumber Co.	13, 16, 17
State v. Daues, 323 Mo. 388, 19 S. W. (2d) 700	13

PAGE

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508 27
Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399 5
United States v. A. Bentley & Sons Co., 293 F. 229 ..... 9, 11
Webster v. Fall, 266 U. S. 507 15
Whiting v. Town of West Point, 88 Va. 905 13
Williams v. N. Y. P. & N. R. Co., 11 F. (2d) 363 13
Zimmern v. United States, 80 F. (2d) 993 11

STATUTES AND GENERAL ORDERS.

Decisions and Orders of National Labor Relations Board, Vol. 1, p. 618 14
Decisions and Orders of National Labor Relations Board, Vol. 2, p. 248 17
Decisions and Orders of National Labor Relations Board, Vol. 2, p. 577 16
Federal Trade Commission Act, 15 U. S. C. 45 7
National Labor Relations Act, Sec. 2(3) 19
National Labor Relations Act, Sec. 2(9) 20
National Labor Relations Act, Sec. 10(b) 23
National Labor Relations Act, Sec. 10(c) 14, 19
National Labor Relations Act, Sec. 10(e) 6, 9
National Labor Relations Act, Sec. 10(i) 9
Prentice-Hall Labor Service, Sec. 18,211 and 18,230 22
United States Code, Title 28, Secs. 347 and 350 5

TEXT BOOKS AND ENCYCLOPEDIAS.

49 Corpus Juris 558 23
Webster's New International Dictionary 20

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937
No. 706.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MACKAY RADIO & TELEGRAPH COMPANY,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT.

The judgment of the court below was rendered and entered January 11, 1937. [R. 104.]

That judgment, to-wit: "The petition * * * of the * * * Board * * * is denied," was final and self-executing, leaving nothing further to be done.

Assuming that the court was empowered under the controlling statute to entertain a petition for rehearing thereafter, no such petition was filed or presented within the thirty-day period limited by its Rules of Court.[1]

1. There was filed within said thirty-day period a petition for leave to adduce additional evidence and for a rehearing in the event such additional evidence should be adduced and new findings or a modified order made by the Board upon the basis thereof. [R. 105-107.] This, obviously, was not a petition for rehearing, and it was not granted by the court below.

A motion for leave to file a proposed "supplement" to said petition was filed May 10, 1937 (more than three months after the judgment had become final.) [R. 108.] This motion was not granted.

An order *purporting* to grant a petition for rehearing was entered May 17, 1937. [R. 112.]

A *purported* judgment that the Petition of the Board be denied was rendered and entered October 19, 1937. [R. 124.]

The petition for certiorari was filed January 15, 1938.

RESPONDENT'S CONTENTIONS.

Respondent's contentions in opposition to the petition for certiorari may be outlined as follows:

1. That the order of the court below, purporting to grant a rehearing, was void for lack of jurisdiction; that the judgment entered January 11, 1937, was the final judgment herein; that the petition for certiorari, filed more than eleven months thereafter, is too late and should be denied for lack of jurisdiction.

2. That the judgment of the court below does not conflict with any other decision, for the reason that nothing was decided *by the court*, except that the Board's petition for enforcement should be denied.

3. That there is no error in the judgment of the court below.

4. That this cause is not a suitable one for review by this Court, because of the grave deficiencies in the record, as to the pleadings, the findings and the evidence.

I.

This Court Has No Jurisdiction to Grant a Writ of Certiorari as Requested in the Petition Herein.

The jurisdiction of this Court to review decisions of Circuit Courts of Appeals is defined by Sections 347 and 350 of Title 28 of the U. S. Code. Section 350 provides that no writ of certiorari "to bring any judgment or decree before the Supreme Court for review shall be allowed or entered unless application therefor be duly made within three months after the entry of such judgment or decree. . . ." This limitation is jurisdictional. *Toledo Scale Co. v. Computing Scale Co.,* 261 U. S. 399, 418.

The original judgment of the court below denying the petition of the National Labor Relations Board for enforcement of its order herein was filed and entered January 11, 1937. However, petitioner does not seek a review of this judgment, but of a "judgment" entered, after a so-called rehearing, on October 19, 1937. [R. 124, P. 2.] Unless the judgment of October 19, 1937, was entered within the proper exercise of the jurisdiction of the said Circuit Court of Appeals it is a nullity, with the result that the judgment of January 11, 1937, was the final judgment herein. It follows that this petition for certiorari was filed more than nine months too late. It is the contention of this respondent that the "rehearing" in the court below was held after the jurisdiction of that court had been exhausted both under its own rules and under the provisions of the National Labor Relations Act. In accordance with this contention respondent duly caused its exceptions to be noted to the order entered herein by the lower court on May 17, 1937, granting the petition for rehearing. [R. 112.]

A. THE CIRCUIT COURT OF APPEALS WAS WITHOUT JURISDICTION UNDER THE NATIONAL LABOR RELATIONS ACT TO GRANT A REHEARING, THEREFORE, THE JUDGMENT OF JANUARY 11, 1937, WAS THE FINAL JUDGMENT OF THE COURT BELOW, AND THIS PETITION FOR CERTIORARI WAS FILED TOO LATE.

The jurisdiction of the Circuit Court of Appeals to review decisions and orders of the National Labor Relations Board is conferred by Section 10(e) of the National Labor Relations Act. In proceeding under this section the Circuit Court of Appeals was not exercising its general jurisdiction as an appellate court but was functioning as a special statutory court; not as a court of appeal but as a court of the first instance. It is, in fact, a newly created tribunal of limited jurisdiction which never existed prior to the enactment of the National Labor Relations Act. As such, it possesses such powers, duties and jurisdiction as are conferred upon it by that Act and no more.

The Court's powers under the Act are stated in Section 10(e) thereof, as follows:

> "* * * to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

In addition to the foregoing, the Court, upon a proper and seasonable application for leave to adduce additional evidence

> "* * * may order such additional evidence to be taken before the Board * * *."

The foregoing comprise all of the powers expressly granted to the court in this Act, and under the rule, *expressio unius exclusio alterius,* no additional powers can be implied.

These provisions of the National Labor Relations Act were copied, substantially verbatim, from the corresponding provisions of the Federal Trade Commission Act, 15 U. S. C. 45. Prior to their adoption in the instant Act it had been held that a circuit court of appeals when functioning thereunder possesses no general jurisdiction or "inherent" or implied powers. In *Federal Trade Comm. v. Balme, supra,* 23 F. (2d) at 618, the court said:

> "The Federal Trade Commission Act confers special statutory jurisdiction, and the extent of such jurisdiction and the conditions of its exercise over subjects or persons must necessarily depend upon the terms in which the jurisdiction is thus conferred. It does not depend upon the rank of the court upon which it is conferred. It must be strictly pursued because the court does possess jurisdiction over other subjects or persons more extended and general."

In *Chamber of Commerce v. Federal Trade Comm., supra,* 280 F. at 47, the court said:

> "This act creates powers not otherwise conferred upon Circuit Courts of Appeals, and such courts are limited strictly to the powers thus specified."

It is a settled rule of statutory construction that when a statute which has been judicially construed is reenacted in the same or substantially the same terms, the Congress is presumed to be familiar with that construction and to have adopted it as part of the law, unless a different construction is expressly required. *Dollar Sav. Bank v. United States,* 19 Wall. 227, 237; *Camp v. Gress,* 250 U. S. 308, 315, 316; *Heald v. Dist. of Columbia,* 254 U. S. 20, 22, 23.

The application of this rule to the instant problem constrains the conclusion that Congress, in enacting the National Labor Relations Act in the light of the construction theretofore placed by the courts upon the Federal Trade Commission Act, intended to grant to the courts the several powers enumerated therein and none other. It follows that when the court herein had rendered its self-executing judgment denying the Board's petition, and had caused the same to be entered without reservation, it had no power thereafter to entertain or to grant a petition for rehearing. It is of course conceded that if the court had entered a decree for the enforcement of the Board's order by injunction, it would have retained jurisdiction so long as such injunction remained in force. But that is not this case.

Not only does this Act omit (*ex industria* as we think) to confer power upon the court to grant a rehearing, but the clear implication of its provisions is that the court shall not possess that power. It provides, Section 10(e), that the

> "* * * judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States * * * as provided in sections 239 and 240 of the Judicial Code as amended (U. S. C., Title 28, secs. 346 and 347)."

This is tantamount to declaring that there shall be no review of the judgment except by the Supreme Court. This means that there shall be no rehearing by the court below, because a rehearing is a review of the case upon the same record by the same court. *United States v. A. Bentley & Sons Co.*, 293 F. 229, 237.

Another circumstance which tends to confirm the conclusion that a rehearing after final judgment is not authorized under this Act is the provision in Section 10(i) thereof, that

> "Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

Petitions for rehearing are always dilatory in effect, regardless of their intent. The proceedings incident to the purported rehearing herein caused a delay of more than nine months from the entry of the final judgment to the re-entry of the same judgment.

It is submitted that the judgment entered January 11, 1937, was and is the final judgment herein and that all proceedings of the Circuit Court of Appeals, subsequent thereto, were *coram non judice* and of no effect.

B. THE COURT BELOW WAS WITHOUT JURISDICTION UNDER ITS OWN RULES TO GRANT A REHEARING IN THIS PROCEEDING.

The same result is reached even if it be assumed (though not conceded) that the court, while functioning as a special *nisi prius* court pursuant to this Act, possesses all of the powers which inhere in it as a court of general jurisdiction when functioning as an appellate court. This is because of the fact that no petition for rehearing was presented to it within the thirty-day period limited by its Rules of Court,[2] which in this connection have the force of law. *Morse v. United States,* 270 U. S. 151. Thus, even upon the assumption of general jurisdiction and "inherent powers," the court's jurisdiction of this proceeding terminated February 11, 1937, and it had no power thereafter to recall or reconsider its judgment.

There was filed on February 9, 1937, within said thirty-day period, a document entitled "Petition of National Labor Relations Board for Leave to Adduce Additional Evidence and for Rehearing; and Notice of Motion." [R. 105-107.] An examination thereof discloses indubitably that *this was not a petition for rehearing.* It was a petition for leave to adduce additional evidence (which petition was not granted), and for a reconsideration of the

---

2. Rule 29 of the court below provides: "A petition for rehearing may be presented within 30 days after judgment."

case *only in the event* that such additional evidence should be adduced. The prayer, in this behalf, was for "* * * a rehearing in this cause *in the event* the Board, * * * makes new findings, or makes recommendations for the modification of its order, by reason or upon the basis of the additional evidence so adduced." (Italics supplied.) This was not a petition for rehearing, either in form or in substance. "A rehearing is simply a new hearing and a new consideration of the case on the same record." *United States v. A. Bentley & Sons Co.*, 293 F. 229, 237. A petition, though entitled "petition for rehearing," which is not this, in substance, does not operate to toll the time for taking an appeal. *Zimmern v. United States,* 80 F. (2d) 993, 994. The order purporting to grant a rehearing was made May 10, 1937, more than three months after the final judgment. Assuming, but not conceding, the power of the court to grant a rehearing upon its own motion, we submit that it could not do this, in any view, after the time for review upon certiorari had expired.

If either of the foregoing contentions is sound, it follows that the judgment entered January 11, 1937, was and is the final judgment in said proceeding; that the proceedings thereafter taken therein, including the purported decision of October 19, 1937 (which did not purport to change in any respect the judgment of January 11, 1937), were *coram non judice* and an utter nullity; with the result that this petition for certiorari, which was filed more than ten months after the entry of the final judgment, is too late and should be denied for want of jurisdiction.

II.

The Decision of the Court Below Is Not in Conflict With Any Other Decision Either of This Court or of Any Circuit Court of Appeals.

A. Since Each Judge Rendered a Separate Opinion, the Decision of the Court Established Only the Rights of the Parties Without Creating Any Precedent.

The principal ground alleged for granting certiorari herein is the assertion that the decision below conflicts with other decisions in the Fourth and Fifth Circuits and with a later decision in the Ninth Circuit. It is the position of the respondent that there is not and cannot be any such conflict, because of the fact that *the court* below did not decide any point of law. Nothing was decided below *by the court* except that the Board's petition should be denied. As pointed out by petitioner (Petn. 7-9), each of the three judges filed a separate opinion and neither of them concurred in anything said by either of the others. The only conclusion concurred in by a majority of the court was that the Board's petition should be denied.[3]

It is settled law that, in a court composed of several judges, an opinion not concurred in by a majority thereof is not the opinion of the court; does not determine any

---

3. It is respondent's contention that the decision of January 11, 1937, was the final judgment and that the subsequent proceedings were void for lack of jurisdiction. What is here said, however, applies with equal force to the decision and judgment of January 11, 1937, and to the purported decision and judgment of October 19, 1937. The two "decisions" are identical and no change was made in the respective opinions that is material in this connection.

question of law; creates no precedent; and has no standing in the law of *stare decisis*. *Luco v. De Toro,* 88 Cal. 26, 28; *State v. Daues,* 323 Mo. 388; 19 S. W. (2d) 700, 707; *Whiting v. Town of West Point,* 88 Va. 905, 910. In the application of this principle, a judgment which is affirmed upon appeal by an equally divided court concludes the parties but cannot settle any principle of law. *Etting v. The Bank of the United States,* 11 Wheat. 59, 78; *Durant v. The Essex Co.,* 7 Wall. 107, 113; *Hertz v. Woodman,* 218 U. S. 205, 214; *Williams v. N. Y. P. & N. R. Co,* 11 F. (2d) 363, 366. The court below has since expressly recognized and declared, in effect, that its decision in the instant case created no precedent.[4] Manifestly, if it created no precedent, it could not create a conflict.

B. The Decisions in the Jeffery,[5] Bell[6] and Carlisle[7] Cases Are Not Contrary to the Judgment of the Court Below That Enforcement of the Order Be Denied or to the Opinions of the Judges Rendering It.

None of these three decisions is in conflict with the judgment that under the specific pleadings, evidence and findings involved in the case at bar, the Board was not entitled to an order of enforcement. None is in conflict with Judge Mathews' view that there was no allegation in

---

4. In the *Carlisle Lumber Co.* case, see Petn. 13.

5. *Jeffery-De Witt Insulator Co. v. N. L. R. B.,* 91 F. (2d) 134.

6. *N. L. R. B. v. Bell Oil & Gas Co.,* 91 F. (2d) 509.

7. *N. L. R. B. v. Carlisle Lumber Co.* (P. 13.)

the amended complaint, no evidence and no finding that the men named in the complaint were employees, as that word is defined in the Act. None of the three decisions above referred to considered the meaning of the words "reinstatement of employees"[8] in the light of the Fifth Amendment and therefore they could not be either contrary to or in accord with Judge Wilbur's opinion.

Each is distinguishable from the case at bar for numerous reasons. In the *Jeffery* case, the Board made findings of all of the necessary jurisdictional facts which it failed to find herein. It found that the employer was engaged in a business affecting interstate commerce and that the men involved were employees, as defined in the Act, in that they had ceased work because of a dispute which had arisen over their insistance upon and the employer's refusal to accede to a contract with respect to seniority, union shop and check-off.[9] The case at bar is distinguishable because here the Board failed to find that the men were employees, as defined by the Act, and failed to find facts from which such fact could be inferred.[10] Another difference is that in the *Jeffery* case, the unfair labor practice in question was not the refusal to hire strikers; it was the refusal of

---

8. National Labor Relations Act, Sec. 10(c).

9. Decisions and Orders of National Labor Relations Board, Vol. 1, page 618, at page 623.

10. For a full discussion of this deficiency in the findings see Point III-A, at pages 19 to 22.

the employer to negotiate with the union during the strike, and *before* the men sought re-employment. The meaning of the words "reinstatement of employees" and the effect of the Fifth Amendment were not argued in the briefs nor ruled upon. In fact the court, after stating the several points urged by the employer (none of which is involved here) stated:

> "Other contentions going to the constitutionality of the Act have been virtually abandoned * * *."

In *KVOS v. Associated Press,* 299 U. S. 269, 279, this court quoted from *Webster v. Fall,* 266 U. S. 507, as follows:

> "Questions which may lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Under these circumstances, the *Jeffery* case does not determine anything contrary to the judgment of the court below or to the reasoning of either of the two judges who concurred in that judgment.

In the *Bell* case, the Board found the jurisdictional fact which it failed to find in the case at bar. It found that the man against whom the Bell Company had discriminated was an employee, as defined in the Act. Its finding was:

> "The strike, called because of the failure of the respondents and Local No. 258 to reach an agreement

> concerning wages and working conditions, was a controversy concerning terms, tenure and conditions of employment. Berbermeyer ceased work as a consequence of, and in connection with, this current labor dispute."[11]

The decision of the Court, which is reported at 91 F. (2d) 509, did not consider the validity of the Board's order in the light of the Fifth Amendment; indeed, the portions of the order requiring affirmative action which might have constituted a basis for considering the effect of the Fifth Amendment were remanded to the Board for further consideration. According to petitioner (P. 11), the Board made an amended order which the Court enforced without opinion, apparently without considering any constitutional problems. Under such circumstances, it cannot be said that the Bell decision conflicts with the judgment in the case at bar or with the views expressed by the judges who rendered the judgment.

In the *Carlisle* case, the complaint was not based upon the refusal of the employer to re-employ strikers, but upon its refusal to bargain collectively with men who had gone on strike and had been formally discharged prior to July 5, 1935, when the National Labor Relations Act became effective. The Board again found the jurisdictional facts which it failed to find in the case at bar. That is, it found that the men were employees as that term is defined in

---

11. Decisions and Orders of the National Labor Relations Board, Vol. 2, p. 577, at p. 582.

the Act.[12] This circumstance alone would justify a different conclusion in the case at bar than was reached in the *Carlisle* case. Therefore, the judgment of the court below cannot be in conflict with the *Carlisle* decision.

The principal question in the *Carlisle* case was whether the provisions of the Act were retroactive so that a person who had been discharged prior to July 5, 1935, could still be regarded as an employee. The effect of the definition of "employee" was discussed at length. It is not clear that the specific objection that the order of the Board was void under the Fifth Amendment was presented to the court and judges rendering the decision of the court did not discuss the Board's order in the light of such an objection.

Certainly the decisions in these three cases are not in conflict with the judgment of the court below. In the light of *KVOS v. Associated Press* (*supra*), it is submitted that they are not even in conflict with any opinion rendered in the case below.

---

12. Decisions and Orders of the National Labor Relations Board, Vol. 2, p. 248:

> "The union, unable to come to an agreement with the respondent through the ordinary and practical channels of collective bargaining, because of the respondent's stubborn determination not to deal with it in a sincere effort to reach an agreement, resorted to strike, hoping that by the use of this economic weapon the respondent would be forced to bargain collectively with it." (pp. 258-259.)
>
> "That the strike, which began May 3, 1935, and which is still in progress, was a current labor dispute at the time of the aforementioned refusals to bargain collectively cannot be questioned." (p. 262.)
>
> "Thus it is clear that the 263 members of the union went on strike on May 3, 1935, and thereafter were still employees of the respondent *at the time of* the aforementioned refusals to bargain collectively." (Page 262. Italics supplied.)

C. THE JUDGMENT OF THE COURT BELOW IS NOT ERRONEOUS IN THE LIGHT OF THE JONES & LAUGHLIN CASE.

Petitioner further contends that the decision below is erroneous "in the light of the decision of this Court" in the *Jones & Laughlin* case, 301 U. S. 1, 47. Apart from the fact that the decision below determines no point of law which can be extracted therefrom and found to be erroneous, the facts of the two cases are so materially different that there is no just basis for a comparison. The men who were ordered reinstated in the *Jones & Laughlin* case had been *wrongfully discharged* by an "unfair labor practice," in violation of valid provisions of the Act. They were conceded to be employees at the time of the "unfair labor practice." The men ordered reinstated in the instant case *had quit of their own volition before any unfair labor practice had occurred.* They were not employees because there is neither allegation nor evidence nor finding herein that these men had quit work in connection with any current labor dispute, so as to constitute them "employees" within the purview of the statutory provision for the reinstatement of employees. The complaint, in failing to allege that these men were employees whose work had ceased in connection with a current labor dispute, failed to state a cause of action for an order of reinstatement, under the terms of the Act. There is no finding that they were employees, to support the jurisdiction of the Board and no competent substantial evidence of the fact. Nothing said in the *Jones & McLaughlin* case is in conflict with the judgment rendered by the court below upon the record before it.

III.

The Judgment of the Court Below Was Not Erroneous in the Light of the Statute.

As pointed out by petitioner and as set forth under Point II-A of this answer, neither of the judges of the court below concurred in the opinion of either of the others and none of the opinions sets any precedent for any future action by the Board or by any court. The only action taken by a majority of the judges, and therefore by the court, was the rendering of a judgment denying enforcement of the Board's order. The two judges who rendered the judgment of the court rendered separate opinions. If there were erroneous statements in either of these opinions (which we do not concede), such statements cannot be considered error of the *court*. The *court* did not write any opinion; it rendered only a judgment denying enforcement of the Board's order. To determine whether, as petitioner alleges, the judgment of the court in denying enforcement was erroneous, it is necessary to examine not the opinions but the pleadings, the evidence and the findings of the Board and the other documents set forth in the record. It is submitted that the court rightly decided that the enforcement of the Board's order against respondent was not justified in the record.

A. The National Labor Relations Board Had No Jurisdiction Under the Act to Enter Its Order.

The Board sought to exercise its power to order "reinstatement of employees." (Sec. 10(c).) The Act defines employees to include those "whose work has ceased as a consequence of, or in connection with, any current labor dispute * * *." (Sec. 2(3).) The term "labor dispute" is defined as "any *controversy* concerning terms,

tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment * * *." (Sec. 2(9).) Both "dispute" and "controversy" mean a "contest by opposing argument or expression of opposing views or claims; a debate."[13]

The Board did not find that there was any such argument or expression of opposing views or claims at any time prior to the strike which occurred at midnight, October 4, 1935. The Board found that in June, 1935, the point to point operators of ARTA (the men here involved) prepared a general agreement concerning wages and working conditions,[14] and presented same to respondent, but agreed to postpone consideration thereof until later; that they again presented the agreement in September and agreed to respondent's request for time to study same; that they then informed respondent that they were "considering" joint action with the marine operators (not involved here) who "had also presented the Mackay companies with a system agreement."[15]

Up to this point (September 13), clearly there was no dispute or controversy. The Board found that, some time prior to September, 1935, the local point to point operators had sent Salisbury to New York, as their representative,

---

13. Webster's New International Dictionary.

14. This proposed agreement was not produced at the hearing and there was no competent evidence of its contents or provisions.

15. There was no evidence as to the subject or contents of said "system agreements."

to assist the national officers of ARTA in their negotiations "since they were not too familiar with point to point conditions," and (by inference) that he remained there continuously until the strike occurred. [R. 20, 21.] "On October 4 the ARTA negotiators in New York decided that a strike was advisable in view of the unsatisfactory state of the negotiations. Salisbury telephoned the local * * *" [R. 21]; and the strike of the point to point operators in San Francisco then occurred simultaneously with the strike of the marine operators in New York. Thus it is clear that, if there was in fact *any* dispute or controversy, it *must* have taken place in New York, between September 13 and October 4. But there is no finding as to what occurred in New York. The Board's statement that "* * * the ARTA negotiators in New York decided that a strike was advisable in view of the unsatisfactory state of the negotiations," is not a finding that the negotiations had in fact reached an unsatisfactory state. It is not even a finding that there actually were any negotiations in New York. At the utmost, it is merely a finding as to what certain unnamed persons in New York believed or concluded.

The Board found that the local point to point operators struck that evening. There is no finding and no evidence as to who called the strike, or when it was called, or why it was called. There is no finding that it was, in fact, "called" by anyone. The finding is simply that the men "went on strike" that evening. [R. 21.] The inescapable inference from the Board's findings is that the local oper-

ators, upon learning that the operators in New York had voted to strike that evening, decided to go out at the same time so as to give them "moral support." In short, the strike in San Francisco was a sympathetic strike in aid of the strikers in New York. It is submitted that a sympathetic strike is not a "labor dispute," in so far as the "sympathy strikers" are concerned. See *Donnelly Garment Co. v. International Ladies Garment Workers Union* (D. C., Mo., Dec. 31, 193).[16]

An analogous situation was presented to the Supreme Court in the case of *Baltimore and Ohio Railroad Company v. United States,* 293 U. S. 454, where a number of carriers sought to enjoin the enforcement of a rule, promulgated by the Interstate Commerce Commission under the Boiler Inspection Act, requiring the installation of certain safety devices on steam locomotives. Under that statute the Commission was empowered to prescribe such rules for the purpose of removing "unnecessary peril to life or limb." This Court held that the failure of the Commission to find that its rule was required to remove "unnecessary peril to life or limb" was a jurisdictional defect which rendered its order void. Similarly, since the National Labor Relations Act limits the power of the Board to reinstatement of *employees,* the absence of any finding from which the Court can conclude that the five men were employees within the meaning of the Act was a failure to find a basic jurisdictional requirement.

16. Reported in Prentice-Hall Labor Service, Sec. 18,211 and 18,230.

B. THE BOARD'S ORDER WAS IMPROVIDENTLY MADE AND ENFORCEMENT WAS PROPERLY DENIED BECAUSE THE AMENDED COMPLAINT FAILED TO ALLEGE A JURISDICTIONAL REQUIREMENT, TO-WIT, THAT THE MEN NAMED IN THE COMPLAINT WERE EMPLOYEES AS DEFINED IN THE ACT.

Section 10(b) of the Act provides for the issuance and service of a complaint "stating the charges" in respect of any unfair labor practice. It further provides that the complaint may be amended at any time prior to the issuance of an order based thereon. The Board filed its complaint and Mackay answered. During the hearing, the Board filed an amended complaint and it was stipulated that, except as to matters admitted in the answer theretofore filed by Mackay, the allegations of the amended complaint should be deemed to be denied. [R. 900-901.][17]

The vital question which petitioner seeks to have reviewed is whether Mackay can be compelled, against its will, to employ men who the Board *now* alleges (after failing so to allege in its complaint or to find in its decision) had ceased work in connection with a current labor dispute. The jurisdiction of the Board is dependent upon the existence of the status of employer and employee. Here, where the workers voluntarily ceased work and refused to render services, they could be employees, as defined by the Act, *only if* they did so "in connection with a current labor dispute."

---

17. The petition herein refers only to the original complaint (Petn. 4), and contains no mention of the fact that this was displaced and superseded by an amended complaint which was filed thereafter "to conform to the proof." [R. 7-9; 17, note 1.] The effect of this was to abandon and completely eliminate the original complaint as a pleading. 49 C. J. 558, and cases cited.

The amended complaint does not allege that the five men were employees at the time Mackay refused to offer them employment and thus, so it is argued by petitioner, committed an unfair labor practice. Neither does said amended complaint allege that the men had ceased work in connection with a labor dispute. On the contrary, it alleges that Mackay refused to *re-employ* the men. [R. 8.] There is no inference, in said complaint, that the men were employees at that time. The inference is to the contrary, because men who are already employed cannot be re-employed. If they were not employees the Board had no jurisdiction to make any order in respect of their future employment.

Failing to allege that the men were employees, either as defined in the Act or otherwise, the complaint fails to state a cause of action under the Act. *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427. This Court there said:

> "Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."

For this reason alone, the court below properly denied enforcement of the Board's order.

C. The Evidence Does Not Support the Board's Order Because It Fails to Show That the Men Named in the Amended Complaint Were Employees as Defined in the Act.

It is submitted that the evidence is equally insufficient to establish that the men named in the complaint were employees and therefore, that the Board had jurisdiction in this cause. While it is perhaps adventurous to make a categorical statement concerning a mass of evidence which covers more than a thousand closely printed pages [R.

125-1140], it is confidently believed to be the fact that there is no *competent* evidence in the record which even tends to prove the existence of a current labor dispute at the time the strike took place. Certainly, the petitionerer has not referred to any such evidence. He has not even claimed that there is any such evidence.

The record includes a vast deal of incompetent evidence —hearsay, hearsay "twice removed," opinions of lay witnesses, statements of conclusions, etc. Respondent does not contend that the admission of incompetent evidence in a proceeding under this Act constitutes reversible error. Respondent does contend, however, that where, as here, proof of a given fact is an indispensable predicate to the jurisdiction of the Board to make the order, there must be *some* substantial *competent* evidence which tends to prove that fact. *Arkansas Wholesale Grocers Assn. v. Federal Trade Comm.,* 18 F. (2d) 866, 871; *Hills Bros. v. Federal Trade Comm.,* 9 F. (2d) 481, 484; *Federal Trade Comm. v. A. McLean & Son,* 84 F. (2d) 910, 911; *Federal Trade Comm. v. Curtis Co.,* 260 U. S. 568, 580; *International Shoe Co. v. Federal Trade Comm.,* 280 U. S. 291, 297.

It is apparent from the testimony, as well as from the findings, that *there was no current labor dispute up to the time of the strike,* unless such a dispute occurred in New York. There is no competent testimony as to *anything* which occurred in New York during this period (from September 13 to October 4). If there was *any* testimony upon this subject it necessarily was hearsay, because no witness testified thereto who was in New York at that time. This is most highly significant in the light of the fact that the one witness who could have given competent

testimony upon this subject, of his own knowledge, did not do so, although he was present at the hearing before the Board. Salisbury, who was in New York, as the representative of the local union, for the purpose of aiding in the negotiations of the national officers, gave no testimony upon this subject, notwithstanding the fact that he was present at the hearing and was sworn as a witness. [R. 971, 972.] The inevitable inference is that no dispute or controversy occurred, as between the respondent and the local union up to the time of the strike.

Under petitioner's construction of the Act the Board is empowered thereby to order the reinstatement of the men when, and only when, they are "employees whose work has ceased in connection with a current labor dispute." This fact is the jurisdictional predicate for the Board's order. The existence of this jurisdictional fact is neither alleged nor proved nor found in this case. It is submitted therefore that the court below did not err in denying enforcement of the Board's order.

D. The Decision of the Court Below Was Not Erroneous in Denying Enforcement of the Board's Order In Toto.

The petitioner alleges that even if Judge Wilbur's opinion be sound (and we submit that it is sound), there is no basis for denying *in toto* the Board's application for enforcement of its order and that the judgment was clearly erroneous. (P. 20.) A reading of the Board's decision, however, discloses that the entire order of the Board is predicated on the assumption that the five men were employees as defined in the Act. Since the Board made no finding to this effect by inference or otherwise, there was no basis for granting enforcement to any part of the order.

IV.

The Record Is Inadequate to Present to This Court Any Question of General Importance.

Petitioner's allegation that this case raises a question of general importance is predicated upon the assumption that the record is adequate to establish that the men named in the amended complaint were employees. Their status as employees depends on whether they ceased work in connection with a current labor dispute. Petitioner continually states that the men struck because of a "failure of negotiations" concerning wages and conditions of employment. (Pp. 2, 9, 11, 19.) There is a complete absence of allegation in the amended complaint, evidence in the record and findings by the Board to support petitioner's statement.[18]

This case presents not primarily a question of law of general importance but primarily a question of whether the pleadings, evidence and findings are sufficient to provide any factual foundation for the Board's order, as distinguished from any question of law of importance. Where the primary question is one of fact, certiorari will be denied. In *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, this court ordered the writ dismissed, stating:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use,—primarily a question of fact."

We submit that no question of public importance should be decided upon a record so deficient in the fundamental requirements of pleading, evidence and findings necessary to present the important question.

---

18. See Point III of this Answer for full discussion in support of this assertion.

V.

Conclusion.

It is respectfully submitted that the petition should be denied because:

(1) The court has no jurisdiction to grant a writ of certiorari as requested in the petition, the petition not having been filed within the time allowed by statute.

(2) The decision of the court below is not in conflict with any decision of this Court or of a Circuit Court of Appeals. No opinion was concurred in by two judges and it is not the opinions but the order denying enforcement of the Board's order which constitutes the judgment of the court below. That judgment is not in conflict with any other decision.

(3) The judgment of the court below was not erroneous in the light of the statute. No other judgment could have been entered for the reason that the Board did not allege or find and the evidence did not establish that the men named in the amended complaint were employees as defined in the Act.

(4) The record is inadequate to present to this Court any question of general importance.

Respectfully submitted,

H. W. O'Melveny,
Walter K. Tuller,
Attorneys for Respondent.

O'Melveny, Tuller & Myers,
Louis W. Myers,
Howard L. Kern,
Homer I. Mitchell,
Of Counsel.